IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 13996 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE JAYANT PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SHRIRAM CERAMIC

Versus

ASSISTANT PROVIDENT FUND COMMISSIONER

Appearance:

1. Special Civil Application No. 13996 of 2003

MR DIPAK R DAVE for Petitioner No. 1

MR PJ MEHTA for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE JAYANT PATEL

Date of decision: 09/03/2004

ORAL JUDGEMENT

Rule. Mr.Mehta, learned Counsel appears for respondent and waives service of notice of rule.

2. With the consent of the parties, the matter is taken up for final hearing today.

3. The short facts of the case appear to be that the notice was served by the respondent to the petitioner for inquiry under Section 7A. The opportunities were given, but it is the case of the petitioner that the unit was closed and, therefore, they could not avail of the opportunity and ultimately the order has been passed on 28th October, 2002 by the respondent, whereby the provident fund liability is fixed of Rs.1,23,876/=. The petitioner preferred review application which also came to be dismissed as per the order dated 20-2-2003 on the ground that it is time barred and no evidence is brought on record.

4. I have heard Mr.Dave, learned Counsel for the petitioner and Mr.Mehta, learned Counsel for the petitioner.

5. The contention of the petitioner is that if the matter is reconsidered by the authority, the petitioner can satisfy the authority that since the unit was closed long back, there is no liability of provident fund contribution.

6. Whereas, on the other hand, the contention of the respondent is that the opportunity of hearing was given, but the same was not availed of and, therefore, no fault can be found with the authority. Mr.Mehta also submitted that there is an alternative, efficacious remedy of preferring appeal and, in any case, even the review application is also dismissed and, therefore, he submitted that the petitioner may be relegated to the remedy of appeal.

7. Considering the facts and circumstances of the case, it appears that since, as per the petitioner, the unit was closed, the opportunities of hearing were not availed of and further the review application was preferred, but the same was not considered since it was time barred. The forum of appeal is available, however, as per the declaration made by the learned Counsel for both the sides, at present there is no Presiding Officer in the Tribunal. When this Court considered the matter on 12-1-2004, the following order was passed:-

" Draft amendment granted."

Mr.Dave, learned Counsel for the petitioner,

states that since the petitioner could not remain present, the petitioner is agreeable to pay the cost of the respondent as may be ordered by this Court and he further states that the petitioner is ready to deposit the amount of Rs.5,000/= towards probable cost of the respondent with this Court. He further states that the petitioner is also agreeable to deposit 25% of the ordered amount of Rs.1,23,876/= with this Court without prejudice to the rights and contentions in this petition.

2. In view of the above notice returnable on 23-1-2004. The petitioner to deposit the amount of Rs.5,000/= and Rs.31,000/= being 25% of the ordered amount with this Court. There shall be stay against the operation of the impugned order on condition to comply with the aforesaid directions to deposit the amount with this Court. Office to issue the notice and stay of the impugned order only after the amount is deposited.

Direct service is permitted."

8. It is true that the petitioner has not availed of the opportunity and, therefore, no fault can be found with the authority for proceeding ex-parte, but at the same time if the matter is considered on merits, it would enable the authority to decide the liability of provident fund after considering the record and material which may be produced by the petitioner. Since it is a matter of breach of principles of natural justice, it is well settled that the existence of alternative remedy is only by way of self-imposed restriction. In the present case, it is the case of the petitioner that the unit was closed.

Further when this Court considered the matter on 12-1-2004, with a view to see that the defaulter or those who are negligent cannot be allowed to take undue advantage, the Court has directed the petitioner to deposit the amount of Rs.5,000/= towards probable cost and even 25% of the amount was ordered to be deposited. Mr.Dave, learned Counsel submitted that the said amount is accordingly deposited by the petitioner with this Court. Therefore, so far as the default on the part of the petitioner is concerned, in my view, can be compensated to the respondent by ordering the cost. Further, with a view to see that such dilatory tactics may not be repeated by any litigant, the condition precedent was made for exercise of the power to deposit the amount of 25% and the said amount is also accordingly deposited. It appears that the said amount of 25%, which is deposited by the petitioner with this Court can be

allowed to be paid to the Assistant Provident Fund Commissioner for depositing the same in the relevant account of the petitioner, subject to the final decision which may be taken by the respondent after hearing the petitioner on merits.

9. Under the above peculiar facts and circumstances, I find no useful purpose would be served in relegating the petitioner to the remedy of preferring appeal, more particularly when the Presiding Officer in the Tribunal is also not available. Instead of relegating the petitioner to the remedy of appeal, I find that the matter may be reconsidered by the authority and the same can be examined on merits in view of peculiar facts and circumstances.

10. In view of the aforesaid, I find that the following directions shall meet with the ends of justice:-

10.1) The petitioner shall pay the cost of Rs.5,000/= to the respondent for not availing the opportunity of hearing and towards the cost of the present litigation. Since the amount is already deposited by the petitioner with this Court, it would be open to the respondent to withdraw the said amount.

10.2) The petitioner shall submit detailed reply to the show-cause notice within two weeks from today and after giving opportunity of hearing, the respondent shall pass the order in accordance with law on merits as to whether there is liability to pay provident fund contribution and if yes, to what extent.

10.3) The aforesaid decision shall be rendered as early as possible preferably within a period of three months from the date on which the petitioner submits the reply.

10.4) Until the final decision is rendered by the respondent, as indicated earlier, the amount of Rs.31,000/= being 25% of the earlier ordered amount shall remain with the respondent. Since the said amount is already deposited by the petitioner with this Court, it would be open to the respondent to withdraw Rs.31,000/= and to credit the same towards provident fund liability in the account of the petitioner. However, such withdrawal and deposit of the said amount in the

respective account of the petitioner shall be subject to the final decision which may be rendered by the respondent, as indicated hereinabove.

10.5) In view of the aforesaid directions to reconsider the matter once again by the respondent on merits, the impugned order dated 24th October, 2002 shall not survive. However, if there is failure on the part of the petitioner to submit the reply within a period of two weeks from today, the order shall operate.

11. The petition is disposed of in terms of the aforesaid directions with the cost as indicated hereinabove. Rule made absolute to the aforesaid extent. Direct service is permitted.

9-3-2004 (Jayant Patel, J.)

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